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IN THE

Supreme Court of the United States

DONALD H. RUMSFELD, Secretary of Defense,
Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN,
As Next Friend of Jose Padilla,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* GLOBAL RIGHTS IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICUS CURIAE[1]

Global Rights respectfully submits this brief in support of respondents, José Padilla and Donna R. Newman, as Next Friend of José Padilla. Both parties have consented to the filing of this brief.

Global Rights is a non-profit public interest legal organization with projects in twenty-two countries engaged in training, technical assistance, advocacy, and litigation around the world. Founded in 1978 as the International Human Rights Law Group, Global Rights provides legal assistance and information in the field of international human rights law and maintains consultative status with the Economic and Social Council of the United Nations. Global Rights' goals include the development and promotion of international legal norms, and its advocates work closely with individuals and organizations worldwide to expand the scope of human rights protections for men and women. Global Rights has represented individuals and organizations before national and international tribunals and has appeared as *amicus curiae* in numerous cases in the United States. *See, e.g., Hamdi v. Rumsfeld*, 337 F.3d 335 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

SUMMARY OF ARGUMENT

Although the United States has played a central role in shaping international human rights and humanitarian law, it has disregarded its obligations under one of the principal human rights treaties it ratified and helped author, the International Covenant on Civil and Political Rights

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[1] This brief was not authored, in whole or in part, by counsel for either party. No person or entity other than the *amicus curiae*, its members, and its counsel contributed monetarily to the preparation or submission of the brief. The parties consented to the filing of the brief and copies of their letters of consent have been lodged with the Clerk of the Court.

("ICCPR"), and under customary international law, by arbitrarily detaining José Padilla. Mr. Padilla is being held outside the imprimatur of law and, absent a legitimate basis for his on-going detention under present conditions, his detention is arbitrary *per se*. Moreover, by denying Mr. Padilla meaningful access to counsel and a substantive opportunity to challenge the basis of his detention, the Executive has deprived Mr. Padilla of the process due under international law.

The Court of Appeals for the Second Circuit correctly held that Article II of the United States Constitution and Congress' Authorization for Use of Military Force ("Joint Resolution") do not authorize the Executive to arrest Mr. Padilla, a U.S. citizen on U.S. soil, and then detain him as an "enemy combatant." *See Padilla v. Rumsfeld*, 352 F.3d 695, 698 (2d Cir. 2003). In light of its long tradition of considering international law when defining the scope of detention powers during periods of conflict, in examining the breadth of an individual right, and in interpreting ambiguity in Congressional acts, this Court should not read international law to permit Article II or the Joint Resolution to support Mr. Padilla's arbitrary detention. We therefore urge the Court to affirm the Second Circuit's decision in this case.

ARGUMENT

I. INTRODUCTION

The fundamental principle of a free society is that personal liberty cannot be denied in the absence of a lawful mandate. *See Hines v. Davidowitz*, 312 U.S. 52, 71 (1941) (describing Congressional opposition to "unnecessary and irritating restrictions upon personal liberties of the individual" because those restrictions "were at war with the fundamental principles of our free government"). Arbitrary detention is anathema to the Framers' vision for the United States legal system: "[T]he practice of arbitrary imprisonments, [has] been, in all ages, the favorite and most formidable instrument[ ] of tyranny." Alexander Hamilton, *Federalist Paper No. 84, in The Federalist Papers: A Collection of Essays Written in Support of the Constitution of the United States* 261 (Roy P. Fairfield ed. 1981); *see also Duncan v. Kahanamoku*, 327 U.S. 304, 322-23 (1946) ("[T]he founders . . . were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws. Their philosophy has been the people's throughout our history. For that reason we have maintained legislatures chosen by citizens or their representatives and courts and juries to try those who violate legislative enactments.").

In this case, the President, as Executive and Commander-in-Chief, has asserted near absolute power over José Padilla in disregard of a number of basic human rights that the United States has been instrumental in developing and defending around the world. The Executive has claimed the power to deprive Mr. Padilla of his liberty indefinitely, of any meaningful assistance of counsel, of the right to know the charges against him, and of the right to a meaningful opportunity to challenge the basis of his detention. Added to this deprivation of procedural rights is the fact that until only last month, Mr. Padilla has been held largely incommunicado at a secret location, in conditions that are unknown, and for a purpose that remains secret.[2] This gross assertion of power is inconsistent with the letter and structure of international human rights and humanitarian law that the United States has

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[2] Mr. Padilla has been held largely incommunicado from the time he was taken into military custody in June 2002 until March 3, 2004 when he was permitted to meet and speak with his lawyers. The Government claimed that it allowed "[Mr.] Padilla access to counsel as a matter of discretion and military authority." News Release, Department of Defense, Padilla Allowed Access to Lawyer (Feb. 11, 2004), *at* http://www.defenselink.mil/releases/2004/ nr20040211-0341.html. The Government videotaped Mr. Padilla's meeting with counsel, stationed a member of the military for the entirety of the meeting, and photocopied all of the attorneys' notes from that meeting. *See* Phil Hirschkorn, *After 22 Months, 'Dirty Bomb' Suspect Sees Lawyers*, CNN.com, Mar. 3, 2004, *at* http://www.cnn.com/2004/LAW/03/03/ enemy.combatant.visit/.

helped to create and promulgate worldwide, in the name of liberty and justice.[3]

The prohibition on arbitrary detention in the International Covenant on Civil and Political Rights ("ICCPR"), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, and ratified by the United States on June 8, 1992,[4] is clear. The ICCPR is the binding law of the United States, and the U.S. Government abided by the prohibition on arbitrary detention for nearly a decade. Whether dealing with Soviet or Cuban spies, Iraqi Republican Guard, or persons accused of committing or conspiring to commit terrorist acts in the United States, such as Abu Omar, Timothy McVeigh and Terry Nichols, the United States has – until the attacks of September 11, 2001 – observed the ICCPR's provisions governing detention. Many of those individuals were spies and saboteurs of the highest order with heinous plots against the United States, but the Government provided them with the protections guaranteed by Article 9 of the ICCPR, including meaningful access to counsel and a meaningful opportunity to review the basis of their detentions.

The unique circumstances surrounding Mr. Padilla's detention require adherence to those provisions of the ICCPR designed to proscribe government action that would deprive individuals of their fundamental human rights. Mr. Padilla was initially apprehended in Chicago O'Hare International Airport by one of the national law enforcement entities of the

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[3] The United States played a principal role in the drafting and negotiation of the ICCPR. *See* U.N. GAOR 3d Comm., 13th Sess., Agenda Item 32, 863d mtg., at 137 para. 17 (1958) (describing comments from a U.S. representative regarding the ICCPR's prohibition on arbitrary detention).

[4] The treaty became effective in the United States on September 8, 1992, three months after the President deposited it with the United Nations Secretary General. *See* Multilateral Treaties Deposited with the Secretary General: Status as of Dec. 31, 2002, U.N. Doc. ST/LEG/SER.E/22, at 165 (2002).

U.S. Government, the Federal Bureau of Investigation. This arrest followed the issuance of a material witness warrant by a grand jury in the Southern District of New York. Subsequently, on the basis of two conclusory statements, without providing any opportunity to challenge these statements, the Executive transferred Mr. Padilla from law enforcement custody to the United States Navy for indefinite detention aboard a Naval brig as a so-called "enemy combatant." *See* Determination of President George W. Bush para. 6 (June 9, 2002); Declaration of Michael H. Mobbs para. 16 (Aug. 27, 2002) ("Mobbs Decl."); *see also Padilla*, 352 F.3d at 699–701. To our knowledge, never before in U.S. history has the Executive arrested and detained a U.S. citizen on U.S. soil, then transferred him into the care of the Secretary of Defense as a so-called "enemy combatant" *without* full Congressional authorization and *without* any meaningful opportunity to challenge the basis of detention.

As this Court noted a quarter of a century before the United States ratified the ICCPR, our defense of this country includes the defense of its democratic and humanitarian values: "Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart." *United States v. Robel*, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.").

After taking a lead role in the development of international human rights law and, in particular, the ICCPR, the U.S. Government now challenges the applicability of that law to the detention of Mr. Padilla. Since the Second World War, the United States maintained the good fortune of not sustaining a major attack on its mainland. Military and economic strength, combined with an arsenal of foreign policy tools, has kept America's enemies in check. Among those policy tools have been the promotion of democracy, the rule of law, and the protection of human rights, combined with a keen awareness of reciprocity. *See* Thomas Paine,

Dissertation on First Principles of Government, in 2 *The Complete Writings Of Thomas Paine* 588 (Philip S. Foner ed., 1945) ("He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."). But in the face of the September 11, 2001 attacks, the Government has disregarded the ICCPR and customary international law's prohibition on arbitrary detention.[5] The Government's haste to act has also dangerously undermined the fundamental foreign policies that have been the foundation of our relations with the world community. Global Rights therefore urges steadfast adherence to the rule of law.

II. The Government's Detention of Mr. Padilla Is Arbitrary under International Law.

The Government's detention of Mr. Padilla is arbitrary under international law because the ICCPR, which is binding on the United States, provides that "[e]veryone has the right to liberty and security of person" and "[n]o one shall be subjected to arbitrary . . . detention." ICCPR art. 9(1). *See* U.N. GAOR 3d Comm., 13th Sess., Agenda Item 32, 863d mtg. at 137 para. 17 (1958) (discussing argument from a U.S. representative to include "arbitrary" rather than "illegal" or "unjust" in Article 9 of the ICCPR because "the word 'arbitrary' embodied both ideas and indeed went appreciably beyond them").[6] Accordingly, "[n]o one shall be deprived of

[5] Following the Government's argument that it should be permitted to hold the Guantanamo Bay detainees indefinitely, the Court of Appeals for the Ninth Circuit considered whether the Government was also free to torture or summarily execute the detainees. *See Gherebi v. Bush*, 352 F.3d 1278, 1299-1300 (9th Cir. 2003). The Court stated that "the government advised [ ] that its position would be the same even if the claims were that it was engaging in acts of torture or that it was summarily executing the detainees." *Id.* ("To our knowledge . . . the U.S. government has never before asserted such a grave and startling proposition.").

[6] In interpreting the treaty, the Court should consider the intent of the

his liberty except on such grounds and in accordance with such procedures as are established by law." ICCPR art. 9(1). The law does not recognize the term "enemy combatant" as legal grounds for the indefinite and unchallengeable detention of Mr. Padilla. Moreover, the Government has failed to notify Mr. Padilla of the charges against him, as required by Article 9(2) of the ICCPR and customary international law. Finally, the Government has denied Mr. Padilla a meaningful opportunity to challenge the basis of his detention, as required by Article 9(4) of the ICCPR and customary international law.

A. No Law Establishes Procedures for Detaining Mr. Padilla as a So-Called "Enemy Combatant."

The Government maintains that Mr. Padilla's detention is legitimate and outside judicial review solely because they have designated him as an "enemy combatant." Determination of President George W. Bush para. 6 (June 9, 2002); (Mobbs Decl. para. 16); Pet'r's Br. at 27-49. However, the term "enemy combatant" is both undefined and unrecognized at law.

The Government relies exclusively on *Ex parte Quirin*, 317 U.S. 1 (1942), as the lone source of law to support its classification of Mr. Padilla as a so-called "enemy combatant." *See* Pet'r's Br. at 6, 7, 14, 28, 30-34, 42, 47, 49. Other than *Quirin*, no source of U.S. or international law, including the laws of war,[7] references the term "enemy

parties to the treaty and their post-ratification understanding of the treaty. *See Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) (stating that the Court has "traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the postratification understanding of the contracting parties").

[7] The laws of war were largely incorporated into the Geneva Conventions after World War II. Neither the Third nor the Fourth Geneva Convention, ratified and binding on the United States in instances of declared wars and armed conflicts, refer to the Government's newly invented classification "enemy combatant." *See* Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, arts. 4-5, 75 U.N.T.S. 135 (entered into force

combatant." The Government's reliance on *Quirin* is misplaced, as the Court in that case did not create a new and completely unprivileged class of combatants. Rather, the Court used the term "enemy combatant" when noting the difference between lawful and unlawful combatants.[8]

Furthermore, neither this Court's use of the term "enemy combatant" in *Quirin* nor adherence to the White House Counsel's "enemy combatant" designation procedures, *see* 150 Cong. Rec. S2701, S2703–S2704 (daily ed. Mar. 11, 2004) (reprinting Alberto Gonzales, White House Counsel, Remarks before the American Bar Association's Standing Committee on Law and National Security, (Feb. 24, 2004)), permits the Executive to strip the so-deemed "enemy combatants" of all procedural rights. Notably, while borrowing the term "enemy combatant" from *Quirin* to describe Mr. Padilla, the Government fails to address the difference in process afforded to the *Quirin* saboteurs and Mr. Padilla. In *Quirin*, the Government formally notified the Nazi saboteurs of the charges against them, allowed them

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with respect to the United States Feb. 2, 1956) ("Third Geneva Convention"); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force with respect to the United States Feb. 2, 1956) ("Fourth Geneva Convention"). After ratification and deposit of the treaty instrument, the Third and Fourth Geneva Conventions took effect with regard to the United States on February 2, 1956.

[8] Detainees, to whom the Third and Fourth Geneva Conventions apply and whom those Conventions nevertheless do not protect, are often referred to as "unlawful combatants." Before those Conventions were opened for signature, this Court defined the terms "lawful combatant" and "unlawful combatant." *Ex parte Quirin*, 317 U.S. 1, 30-31 (1942) ("By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.") (footnote omitted).

representation by counsel, tried them before military tribunals at the time they filed their petitions for writ of habeas corpus, and afforded them the opportunity to challenge the Government's evidence against them. *See Ex parte Quirin*, 317 U.S. at 6-10. That abundance of process provided to the *Quirin* saboteurs stands in stark contrast to Mr. Padilla's complete denial of process.

Since *Quirin* is unable to support the Government's invented classification of "enemy combatant," and there is no other legal support for this imagined term, the detention of Mr. Padilla violates the well-settled principle of customary international law that "[e]very person in enemy hands must have some status under international law." *Commentary Vol. IV: Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 51 (Jean S. Pictet 1958) ("There is no intermediate status; nobody in enemy hands can fall outside the law.") (emphasis omitted).

Consistent with that principle is the express requirement of the ICCPR, a treaty ratified by and thus binding on the United States,[9] that "no one shall be deprived of his liberty on such grounds and in accordance with such procedures as are established by law." ICCPR art. 9(1). At the time the Government transferred Mr. Padilla into the custody of the Department of Defense, no law established procedures or grounds for detaining him or anyone else as a so-called "enemy combatant." The Court of Appeals for the Second Circuit correctly held that neither the Authorization for Use of

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[9] Treaties are agreements among sovereign powers that, once ratified by the United States, are the supreme law of the land. *See* U.S. Const. arts. II, § 2 & VI, cl. 2; *Zicherman*, 516 U.S. at 226 (stating that "a treaty ratified by the United States is . . . the law of this land") (citing U.S. Const. art. II, § 2); Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. Int'l L. & Pol. 35, 42 (1997) (stating that "domestic courts should faithfully recognize the obligations imposed by international law. The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations.").

Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("Joint Resolution"), nor the Executive's constitutional powers authorized Mr. Padilla's detention. *See Padilla*, 352 F.3d at 699, 710-715, 722-724. Therefore, the White House Counsel's procedures for designating an enemy combatant, purportedly authorized under Article II and the Joint Resolution and publicly announced nearly two years after Mr. Padilla was so designated, *see* 150 Cong. Rec. at S2703–S2704, lack any legal authority.[10]

Likewise, customary international law[11] flatly prohibits arbitrary detention: "A state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention." Restatement (Third) of the Foreign Relations Law of the United States § 702(e) (1987) ("Restatement (Third)"). *See, e.g., Alvarez-Machain v. United States*, 331 F.3d 604, 621 (9th Cir.) (en banc) (holding that detention is "arbitrary" and an abridgement of human rights when "it is not pursuant to law; it may be arbitrary also if it is

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[10] The United Nations Human Rights Committee and several international legal scholars have noted that detentions justified under domestic law nevertheless may be arbitrary and unlawful under international law. *See* Restatement (Third) of the Foreign Relations Law of the United States § 702 cmt. h (1987) (stating that detention is arbitrary "if it is not pursuant to law; it may be arbitrary also if it is incompatible with the principles of justice or with the dignity of the human person") (internal quotations and citation omitted). Thus, if the Government's interpretation of the existing U.S. laws, *e.g.*, Article II and the Joint Resolution, that purportedly authorize Mr. Padilla's detention is arbitrary under international law, then his detention may be characterized as unjust.

[11] Customary international law, or the law of nations, "results from a general and consistent practice of states followed by them from a sense of legal obligation." Restatement (Third) § 102(2); *see Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206 (D.C.Cir. 1985) (noting that the terms "customary international law" and "law of nations" are interchangeable); *see also United States v. Yousef*, 327 F.3d 56, 91 n.24 (2d Cir. 2003) ("Customary international law is comprised of those practices and customs that States view as obligatory and that are engaged in or otherwise acceded to by a preponderance of States in a uniform and consistent fashion.").

incompatible with the principles of justice or with the dignity of the human person") (citation omitted), *cert. granted*, 124 S. Ct. 807, 821 (2003); *Al-Nashif v. Bulgaria*, 36 Eur. H.R. Rep. 37 para. 94 (2002) ("National authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved. . . .").

Neither the ICCPR nor customary international law creates an exception from this prohibition on arbitrary detention for the Executive's invented "enemy combatant" classification – a label apparently contrived as a rationalization to deny detainees any rights due under the law. Thus, the President cannot declare through Executive fiat that a certain class of detainees is immune to the prohibition on arbitrary detention imposed by the ICCPR and customary international law.

B. The Executive Has Deprived Mr. Padilla of His Right to Be Notified of the Legal Basis of His Detention.

The Executive's contrived "enemy combatant" classification does not exist at law; beyond that the Government failed to define it at the time Mr. Padilla was arrested. This predicament puts Mr. Padilla in an impossible legal position: Even if he were afforded the opportunity to challenge the basis of his detention, he could not do so in the absence of a standard defining "enemy combatant." By not providing Mr. Padilla with a definition of the term "enemy combatant" at the time he was arrested, the Executive has failed to notify him of the legal basis for his detention.

This failure to notify Mr. Padilla of the charges against him at the time he was arrested violates Article 9(2) of the ICCPR, which requires that "[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." ICCPR art. 9(2). When the Government released Mr. Padilla from the custody of the Department of Justice, which was

holding him as a material witness, it detained him anew under a classification undefined at law and thus violated Article 9(2) of the ICCPR.

Ignoring the clear requirements of the ICCPR, the Government attempts to find support for its spurious "enemy combatant" designation by exaggerating a passing reference to the term in *Quirin*, a Supreme Court decision that pre-dates the United States' ratification of the ICCPR by nearly a half century. *See* Pet'r's Br. at 28; *Quirin*, 317 U.S. at 1. Although the Court used the term "enemy combatant" in its discussion of wartime detainees, the Court never defined it. Instead, the Court invoked the term to characterize "offenders against the law of war." *Quirin*, 317 U.S. at 31 (explaining that an offender against the law of war is, *inter alia*, "an *enemy combatant* who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property") (emphasis added). The Government incorrectly stated that in *Quirin*, the Court recognized that "the 'universal agreement and practice' under the 'law of war' holds that enemy combatants are 'subject to capture and detention . . . by opposing military forces.'" Pet'r's Br. at 28 (citing *Quirin*, 317 U.S. at 30-31); *see also* Pet'r's Br. at 33. Rather, the *Quirin* Court stated that "unlawful" – not enemy – combatants are "subject to capture and detention . . . by opposing military forces." *Quirin*, 317 U.S. at 30-31. Thus, neither *Quirin* nor any other source of law – U.S. or international – appears to provide Mr. Padilla or this Court with any definition of "enemy combatant." The Court's lone reference to the term provides Mr. Padilla with insufficient notice of the legal basis of his detention. In violation of Article 9(2) of the ICCPR, the Government has failed not only to define the term, but also to provide Mr. Padilla at the time of his arrest with a set of criteria or a standard that triggers its applicability to a particular detainee.[12]

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[12] The White House Counsel's procedures for designating "enemy combatants" state that the Executive may designate U.S. citizens as enemy combatants, whether they were arrested on an active field of combat or on U.S. soil. *See* 150 Cong. Rec. at S2703. The procedures define the term "enemy combatant" for those citizens arrested on U.S. soil as "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts...." *Id.* at S2704. But the White House Counsel publicly announced this definition nearly two years after Mr. Padilla's arrest and designation as an "enemy combatant." This definition comes far too late to satisfy the notification requirements of Article 9(2) of the ICCPR. Moreover, the White House Counsel has not provided a definition either for "enemy combatants" generally or for "enemy combatants" arrested outside the United States. Instead, the White House Counsel stated that Yaser Esam Hamdi, whom the Government captured in Afghanistan and designated an enemy combatant, "presents a relatively easy case" and then explained that a "U.S. military screening team confirmed that [Mr.] Hamdi met the criteria for enemy combatants." *Id.* at S2703. However, the White House Counsel did not establish those criteria in his procedures, and Mr. Hamdi clearly does not meet the standard established for U.S. citizens arrested in the United States because Mr. Hamdi did not "enter this country bent on hostile acts." *Id.* at S2704 (quoting *Quirin*, 317 U.S. at 38).

The Executive's failure to provide Mr. Padilla with notice of the legal basis for his detention is also unlawful under customary international law. *See* Restatement (Third) § 702 cmt. h (providing that detention is arbitrary if it "is not accompanied by notice of charges"); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Jan. 23, 1979, 1125 U.N.T.S. 3, art. 75(3) (stating that "[a]ny person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken").

As discussed previously, widespread state practice can evidence the establishment of a custom or norm in international law. *See supra* note 11 and accompanying text. Explaining the import of Article 5(2) of the European Convention on Fundamental Freedoms and Human Rights ("ECHR"), the European Court of Human Rights noted that Article 5(2) "contains the elementary safeguard that any

person arrested should know why he is being deprived of his liberty." *Fox, Campbell & Hartley v. United Kingdom*, App. Nos. 12244/86, 12245/86, 12383/86, 13 Eur. H.R. Rep. 157, 170 (1990), *available at* 1991 WL 838719. Further, the European Court stated that "any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4" of Article 5 of the ECHR. *Id.*; *see also O'Driscoll v. Sec'y of State for the Home Dep't*, Case No: CO/913/2002 para. 24 (Q.B. Div'l Ct. 2002), *available at* 2002 WL 31523307 (agreeing with the European Court of Human Rights that "to be properly prescribed by law an offence must be adequately accessible, and it must be formulated with sufficient care to enable the citizen to regulate his conduct, if need be with appropriate advice") (citing *Sunday Times v. United Kingdom*, 2 Eur. H..R. Rep. 245 (1979). The European Court of Human Rights also has required judges presiding over bond determination hearings to make sure that individuals are detained only upon a careful review of the legal standard for detention. *See TW v. Malta,* App. Nos. 25644/94, 25642/94, 29 Eur. H.R. Rep. 185, 189 para. 41 (2000) (requiring the judge to review the circumstances of detention by referring to legal criteria to determine whether there are reasons to justify detention and to order the release if there are no such reasons). In Spain, the authorities must immediately inform those arrested for terrorist crimes of the reason for their arrests. *See* TC, May 16, 2000 (S.T.C. 127). Moreover, at least one U.S. federal court of appeals has found that detention is arbitrary if executed without an adequate explanation of the legal basis for the detention. *See Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998) (stating that "[d]etention is arbitrary if 'it is not accompanied by notice of charges,'" among other things) (quoting Restatement (Third) § 702 cmt. h and citing ICCPR art. 9).

By depriving Mr. Padilla of the right to notice of the legal basis of his detention, the Executive is arbitrarily detaining Mr. Padilla under international law.

C. The Government's Detention of Mr. Padilla Is Arbitrary under International Law Because the Government Has Deprived Him of a Meaningful Opportunity to Challenge the Basis of His Detention.

In addition to detaining Mr. Padilla under a classification that is neither authorized nor defined, the Government also has arbitrarily detained Mr. Padilla by not providing him with a meaningful opportunity to challenge the basis of his detention. This opportunity, widely recognized as a fundamental right, is required by Article 9(4) of the ICCPR and by customary international law.

Regardless of how the Government classifies or characterizes Mr. Padilla, he is entitled to the protections of the ICCPR, providing that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." ICCPR art. 9(4). At least one U.S. federal court of appeals recently noted that Article 9(4) of the ICCPR requires the United States to subject Executive detention to judicial review. *See Gherebi*, 352 F.3d at 1283 n.7 (quoting ICCPR art. 9(4)).

Mr. Padilla's detention for nearly two years without the opportunity to challenge the Government's characterization of his status deprives him of the fundamental right to liberty and security embodied in Article 9(4). In direct contravention of its obligations under the ICCPR, the Government has denied Mr. Padilla "proceedings before a court" by precluding any testimony in refutation of his detention and by failing to notify him of the legal basis of his detention. *See, e.g., Morgan v. United States,* 304 U.S. 1, 18 (1938) (stating that the right to a "'full hearing' – a fair and open hearing . . .

embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them"). Such a denial of process must survive at least the rigorous review recognized by U.S. due process, *see Mathews v. Eldridge*, 424 U.S. 319, 345-46 (1976), and the law of other states, *see, e.g.*, *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre*, A.C. 97, 111 para. 22 (P.C. 1996) (stating that Hong Kong "courts should construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative detention and should be slow to hold that statutory provisions authorise administrative detention for unreasonable periods or in unreasonable circumstances"). This lack of process constitutes procedural arbitrariness under the ICCPR and must be remedied, if the United States is to comply with its obligations under the ICCPR. *See Alvarez-Machain*, 331 F.3d at 620 (stating that "there exists a clear and universally recognized norm prohibiting arbitrary arrest and detention").

Although the ICCPR provides procedures for derogating from its prohibition on arbitrary detention, the Government has ignored these procedures. To derogate from the ICCPR, the derogating government must officially proclaim the existence of a "public emergency which threatens the life of the nation." ICCPR art. 4(1). Derogation is permitted only when it is "strictly required by the exigencies of the situation," does not involve discrimination, and is consistent with the derogating government's other obligations under international law. *Id.* It is not enough that summary detention without review is within the reasonable range of responses to the situation; the situation must make derogation imperative. *See* U.N. Hum. Rts. Committee, General Comment 29 para. 5, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001) ("General Comment No. 29") (stating that derogating parties must show not only that the exigencies "justify" derogation, but that they "require" it). Parties to the ICCPR may not derogate from certain ICCPR articles. *See* ICCPR art. 4(2). However, Article 9, prohibiting arbitrary detention, is not among them. *See id.*

The derogating power must notify the other ICCPR parties through the Secretary General of the United Nations. *See id.* art. 4(3). States historically have followed derogation procedures to respond to emergency conditions without adverse consequence. The ICCPR makes clear that states derogating from it must only do so temporarily. *See* General Comment No. 29 para. 1. The British government recently derogated from the ICCPR to pass the Anti-Terrorism, Crime and Security Act of 2001. *See* Multilateral Treaties Deposited with the Secretary General: Status as of Dec. 31, 2002, U.N. Doc. ST/LEG/SER.E/22 (2002). In addition, Algeria, Argentina, Azerbaijan, Chile, Colombia, Ecuador, Guatemala, Israel, Nambia, Nepal, Nicaragua, Peru, Poland, the Russian Federation, Serbia and Montenegro, Sri Lanka, Sudan, and Trinidad and Tobago all have formally derogated from the ICCPR in states of siege or imposition of martial law occurring in the past twenty years. *See id.*

Having failed to derogate formally from Article 9 of the ICCPR, however, the Government must adhere to it even in the most trying times. *See Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 para. 25 (Jul. 8) ("The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.").

Even if the Government decided to derogate, the United Nations Human Rights Committee, a panel of experts established to monitor ICCPR implementation, stated recently that "[i]n order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant." General Comment No. 29 para. 16.

Moreover, customary international law requires governments to provide their detainees with a meaningful opportunity to challenge the basis of their detention in times

of war and peace. *See Winterwerp v. The Netherlands*, 2 Eur. H.R. Rep. 387, 403 para. 39 (1979) ("In a democratic society subscribing to the rule of law no detention that is arbitrary can ever be regarded as lawful.") (footnote omitted) (citing European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(3)); *Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995) (stating that arbitrary detention violates the laws of war); *Caballero v. United Kingdom*, App. No. 32819/96, 30 Eur. H.R. Rep. 643, 652 paras. 42–44 (2000) (finding automatic denial of bail arbitrary, in part, because the judge failed, having heard the accused himself, to examine all the facts relating to the existence of a genuine public interest justifying denial).

A principal source of this requirement under customary international law is foreign case law reviewing challenges to alleged arbitrary detentions.[13] Judiciaries in foreign countries facing ongoing terrorist threats have required their governments to provide detainees a meaningful opportunity to challenge the basis of detention, even when the detainees are suspected either of committing or conspiring to commit terrorist acts or of being members of a terrorist organization. *See, e.g.*, Further Hearing 7048/97, *Anon. v. Minister of Defence*, 54(1) P.D. 721, 743 (2000) (permitting Hezbullah detainees the opportunity to challenge the basis of their

[13] U.S. courts historically have determined the content of customary international law by examining the practices of nations, as evidenced by treaties, U.N. declarations, court decisions, and scholarly writings. *See Filartiga v. Peña-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) ("The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'") (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820) (examining scholarly writings to determine content of the "law of nations")); *see also Aquamar, S.A. v. Del Monte Fresh Produce N.A.*, 179 F.3d 1279, 1295 (11th Cir. 1999) ("We look to a number of sources to ascertain principles of international law, including international conventions, international customs, treatises, and judicial decisions rendered in this and other countries.").

detentions by the Israeli government and invalidating detention past the limit of the detainees' sentences); *Queen on the Application of Abbasi & Anor. v. Secretary of State*, 2003 U.K.H.R. Rep. 76 para. 60 (C.A. 2002), *available at* 2002 WL 31452052 (finding that "[t]he underlying principle, fundamental in English law, . . . that every imprisonment is prima facie unlawful" is applicable to British citizens "in war as in peace," as "'no member of the executive can interfere with the liberty . . . of a British subject except on the condition that he can support the legality of his action before a court of justice.'" (quoting *R v. Home Secretary ex p. Khawaja* (1984) 1 A.C. 74)).[14]

As part of the requirement to provide a meaningful opportunity to challenge the basis of detention, British and Spanish courts have held that detainees, accused of committing crimes involving acts of terrorism, are entitled to the right to counsel. *See Regina v. Mullen*, No. 9704978/Z3, 2 Cr. App. R. 143, at 14 (Crim. App. 1999) (holding that "insulation" of an individual, suspected of conspiring to cause explosions likely to endanger life or cause serious injury to property, "from any legal advice following his detention . . .

[14] The consistent practice of other nations under a sense of legal obligation serves as further evidence of customary international law's prohibition on arbitrary detention. *See, e.g.*, American Convention on Human Rights, *adopted* Nov. 22, 1969, Hein's No. KAV 2307, art. 7(2)–(3), 1144 U.N.T.S. 123 ("No one shall be subject to arbitrary arrest or imprisonment."); American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (1948), O.A.S. Off. Rec. OEA/Ser. LV/I.4 Rev. (1965) art. 25; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 5(1), 213 U.N.T.S. 222; Organization of African Unity: Banjul Charter on Human and Peoples' Rights, Jun. 27, 1981, 21 I.L.M. 58 (1982); Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, arts. 3, 9 (1948); *Siderman de Blake v. Argentina*, 965 F.2d 699, 719 (9th Cir. 1992) ("The Universal Declaration of Human Rights is a resolution of the General Assembly of the United Nations. As such, it is a powerful and authoritative statement of the customary international law of human rights.").

was contrary to [his] entitlement as a matter of human rights" and thus "in breach of Public International Law"); TC, May 16, 2000 (S.T.C., 127) (requiring the authorities to immediately inform detainee, after being arrested for a crime involving terrorism, of his right to counsel).

III. THE GOVERNMENT'S ASSERTION THAT IT CAN DISREGARD MANDATES OF INTERNATIONAL LAW CONFLICTS WITH THIS COURT'S TRADITIONAL RELIANCE ON SUCH LAW WHEN DEFINING THE SCOPE OF THE GOVERNMENT'S WARTIME DETENTION POWERS AND INDIVIDUAL RIGHTS.

This Court has traditionally considered international law when interpreting the scope of Executive detention powers, ambiguity in federal statutes, and individual rights.[15] Therefore, the Government cannot rely on Article II of the Constitution and the Joint Resolution to support the arbitrary detention of Mr. Padilla because it is inconsistent with international law. *See* Resp't's Br. in Opp'n to Pet. for Cert. at 14-17.

A. The Court Has Considered International Law When Determining the Scope of Constitutional Powers.

When reviewing the scope of the Executive's detention powers, this Court has long considered international law. Even in the Government's centerpiece case, *Ex parte Quirin*,

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[15] In determining the scope of the Government's constitutional powers, as well as the scope of individual rights, this Court frequently has looked to international law. "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction." *Paquete Habana*, 175 U.S. 677, 700 (1900). Customary international law has long been embedded into American common law. *See Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 159-61 (1795) ("This is so palpable a violation of our own law ... of which the law of nations is a part, as it subsisted either before the act of Congress on the subject, or since ... ").

this Court, when reviewing the scope of wartime detention powers granted to the Executive under Article II, referred to international law in determining what procedural protections must be afforded to those captured and held as "enemy belligerents." *Ex parte Quirin*, 317 U.S. at 31, 38. Considering whether the acts charged constituted an offense against the law of war, this Court consulted various sources of domestic *and* international law to determine the scope of the Executive's detention powers. *Id.* at 35-36 ("This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.") (citing and quoting foreign military manuals and other texts).

Similarly, in determining whether a German national convicted by a U.S. military commission could pursue habeas relief, the Court extensively reviewed the then-relevant rules of international law to ensure that they would not be violated by its decision. *See Johnson v. Eisentrager*, 339 U.S. 763, 785-88 (1950); *id.* at 785 (noting "[t]he practice of every modern government"); *id.* at 786 (citing treaty law); *id.* at 787-88 (citing Hague Regulations and secondary sources on international law). Likewise, in *Ex parte Milligan*, the Court cited the practices of foreign governments in support of its holding that the Executive lacked constitutional power to subject civilians to military courts-martial where the civil administration was not deposed and its courts were open. 71 U.S. (4 Wall.) 2, 38-40 (1866) (discussing power of English and French monarchs to impose courts-martial upon subjects). In turning its back on the demands of international law, the Government is violating the clear precepts of American jurisprudence enunciated by the Court.[16]

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[16] During the Vietnam War, the U.S. Military Court of Appeals ruled that, exceeding his orders, a U.S. Marines lance corporal's forced entry

B. Federal Statutes, Where Ambiguous, Must Be Construed Consistently with Applicable International Law.

Similarly, the Government must enforce the Joint Resolution consistently with international law and avoid a construction of the Joint Resolution, or any other Congressional act, that would violate international law "if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). Accordingly, courts will not interpret a statute to supercede international law absent a clear showing that Congress intended for the statute to do so. *See* Restatement (Third) § 114.

The Joint Resolution generally empowers the Executive to use "all necessary and appropriate force" against those nations, organizations, or persons responsible for the September 11th terrorist attacks, or those persons that harbored such organizations or persons, in order to prevent future terrorist attacks against the United States. But detaining Mr. Padilla as an "enemy combatant," a term unrecognized and undefined at law, cannot be "necessary and appropriate." Moreover, the Joint Resolution never expressly authorizes the Executive to detain Mr. Padilla (or others) as an "enemy combatant" without any opportunity to challenge the basis of his detention. Therefore, to the extent that Mr. Padilla's detention is inconsistent with international law, the Joint Resolution cannot be interpreted to authorize his detention without a meaningful opportunity to challenge the basis of his detention. *See Padilla*, 352 F.3d at 712 (stating that the President's authority to detain Mr. Padilla as an "enemy combatant" is not "at its maximum" because the Joint Resolution does not authorize his detention) (citing

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into a Vietnamese home with the intent to summarily execute its inhabitants "is unjustifiable under the laws of this nation, the principles of international law, or the laws of land warfare." *United States v. Schultz*, 39 C.M.R. 133, 136 (C.M.A. 1969).

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952)) (Jackson, J., concurring).

C. The Court Has Considered International Law When Determining the Scope of Constitutional Rights.

Moreover, when interpreting the scope of certain constitutional rights, this Court also has considered foreign precedent and treaty law.[17] Specifically, the Court has considered foreign precedent when discussing the right to engage in sodomy in the privacy of one's home, *see Lawrence v. Texas*, 539 U.S. 558, __, 123 S. Ct. 2472, 2483 (2003), the history of assisted-suicide law, *see Washington v. Glucksberg*, 521 U.S. 702, 718 n.16 (1997), the application of the Eighth Amendment to the death penalty, *see, e.g., Thompson v. Oklahoma*, 487 U.S. 815, 830-31 (1988) (Stevens, J.); *Enmund v. Florida*, 458 U.S. 782, 796-97 & n.22 (1982); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977); *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958); *see also Stanford v. Kentucky*, 492 U.S. 361, 389-90 (1989) (Brennan, J., dissenting); *Elledge v. Florida*, 525 U.S. 944 (1998) (Breyer, J., dissenting from denial of certiorari), and the conflict between campaign finance laws and the First Amendment, *see Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring). Last term, Justices Breyer and

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[17] The U.S. Supreme Court has "long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances." *Knight v. Florida*, 528 U.S. 990 (1999) (Breyer, J. dissenting from denial of certiorari). Federal appellate courts have shown a similar tendency to draw support from international sources. *See, e.g., Friedrich v. Friedrich*, 78 F.3d 1060, 1068 (6th Cir. 1996) (citing opinions of courts from Canada and the United Kingdom, both of which were signatories to the Hague Convention, to support its restrictive reading of the Hague Convention's implementing legislation); *Nunez-Escudero v. Tice-Menley*, 58 F.3d 374, 377 (8th Cir. 1995) (same) ("We should give considerable weight to these well-reasoned opinions of other Convention signatories.").

Ginsburg also discussed the International Convention on the Elimination of All Forms of Racial Discrimination, a treaty ratified by the U.S., as support for the Court's observation that affirmative action programs "must have a logical end point." *Grutter*, 539 U.S. at 306 (Ginsburg, J., concurring) (framing the extent to which admissions programs at the University of Michigan may consider race, in part, by observing the "international understanding of the office of affirmative action").

IV. THE GOVERNMENT'S DETENTION OF MR. PADILLA IS INCONSISTENT WITH ITS STRONG CONDEMNATION OF ARBITRARY DETENTION AND PROMOTION OF THE RULE OF LAW WORLDWIDE.

The rule of law is only as strong as a government's adherence to it. Its fortitude depends not only upon the independence of a judiciary, but also upon the Executive branch's commitment to law enforcement and to the principles that such enforcement is aimed to preserve. Thus, in the context of international and domestic human rights and humanitarian law, the Government must enforce not only the law but also the principles of human dignity. *See* Jordan J. Paust, *Judicial Power to Determine the Status and Rights of Persons Detained without Trial*, 44 Harv. Int'l L.J. 503, 531 (2003) ("Destruction of American values, overreaction, the weakening of real bases of strength of our democratic institutions, and lawless law enforcement can fulfill terrorist ambitions and are ultimately more threatening than actual terrorist attacks. Judges in a democracy committed to law and human dignity cannot countenance such a result.").

By detaining Mr. Padilla outside the law for over two years without either the opportunity to present testimony to refute the basis of his detention or meaningful access to counsel, the Government is engaging in the very practice of arbitrary detention that it has condemned worldwide for decades. In statements to Congress and to the United Nations, United States government officials recently and repeatedly

have singled out the practice of arbitrary detention by other countries, such as Afghanistan,[18] Cuba,[19] the Democratic Republic of Congo,[20] Iran,[21] Iraq,[22] Russia,[23] and Sudan[24] for

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[18] Testifying before Congress, Secretary of Defense Donald H. Rumsfeld quoted an Amnesty International report stating that the "Afghans suffered pervasive 'human rights abuses, including arbitrary detention ....'" Hearing to Review Testimony on Operation Enduring Freedom Before the Senate Comm. on Armed Services, 107th Cong. (July 31, 2002) (statement of Hon. Donald Rumsfeld, Sec. of Defense), *available at* http://www.senate.gov/ ~armed_services/statemnt/2002/July/ Rumsfeld2.pdf.

[19] *See, e.g.*, Hearing Regarding U.S.-Cuba Economic Relations Before Senate Comm. of Finance, 107th Cong. (Sept. 4, 2003) (statement of Alan Larson, Under Secretary of State for Economic, Business, and Agricultural Affairs, before the Senate Finance Committee), *available at* http://finance.senate. gov/hearings/testimony/2003test/090403altest.pdf.

[20] Statement of Harold Hongju Koh, U.S. Assistant Secretary of State, Democracy, Human Rights & Labor, Before the U.N. Commission on Human Rights (Mar. 30, 2000) (stating that "in the Democratic Republic of Congo . . . government and anti-government forces - as well as troops of the governments supporting each side - have committed . . . arbitrary detentions"), *available at* http://usinfo.state.gov/regional/ea/uschina/ koh330.htm.

[21] Statement of Ambassador Madeleine K. Albright, United States Permanent Representative to the United Nations, on Human Rights Situations and Reports before U.N. General Assembly, Third Comm. (Social, Humanitarian and Cultural) (Nov. 28, 1995), *available at* http://dosfan.lib.uic.edu/ERC/intlorg/ press_releases/951128.html.

[22] While U.S. soldiers were marching to Baghdad, Secretary of State Colin Powell, referring to the State Department's 2002 Iraq Country Report, decried the fact that Iraqi "authorities routinely used arbitrary arrest and detention, prolonged detention, and incommunicado detention, and continued to deny citizens the basic right to due process." U.S. Department of State's Annual Human Rights Report (Mar. 31, 2003), in U.S. Department of State Press Release, State Department Report Outlines Human Rights Abuses in Iraq-Powell Cites Saddam's Regime as Great Threat to Global Peace, Stability, *available at* 2003 WL 2047088.

[23] Statement of Lorne W. Craner, Assistant Secretary of State for Democracy, Human Rights, and Labor, Before a Helsinki Commission

their practice of arbitrary detention. Also, the House and Senate have passed resolutions urging the People's Republic of China to release Wang Bingzhang and Dr. Yang Jianli, who have been arbitrarily detained. *See* S. Res. 184, 108th Cong. (2003) (resolving that Dr. Jianli's detention violates Article 9 of the ICCPR and Article 9 of the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948)); H. Con. Res. 326, 108th Cong. (2003); Press Release, Senator Jon Kyl, Senate Passes Kyl-Mikulski Resolution to Free U.S. Resident Held in China Since 2002 Dr. Yang Jianli Detained in China for Pro-Democracy Views (July 30, 2003), *available at* 2003 WL 11710378. The force of this position is severely diluted when the United States denies fundamental aspects of due process to its own wartime detainees. For example, Russia's arbitrary detentions continue in the face of what Russia has deemed to be terrorist threats from Chechen forces, despite statements from U.S. officials condemning such detentions. *See* Craner Statement, *supra* note 23 (stating that Russia's arbitrary detentions "are not consistent with international humanitarian law or Russia's OSCE and international human rights commitments").

As an unjustified violation of international law, the Government's arbitrary detention of Mr. Padilla also has compromised the United States' concerted effort to promote democracy and the rule of law abroad. Despite the Government's blatant disregard for international law here, the Executive has repeated the case to the American people that the objective of establishing a rule of law in Afghanistan and

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hearing on Sept. 9, 2003, in U.S. Department of State Press Release, Lorne Craner Testimony at Sept. 9 Helsinki Commission Hearing, *available at* 2003 WL 2050164 (Sept. 10, 2003).

[24] Statement of Lorne W. Craner, Assistant Secretary of State for Democracy, Human Rights, and Labor, Hearing on a Review of the State Department Country Reports on Human Rights Practices, Before the House Subcomm. on Terrorism, Nonproliferation and Human Rights, of the House Comm. on Int'l Relations, *available at* 2003 WL 1998849 (Apr. 30, 2003).

Iraq underlies the U.S. military – and now nation-building – exercises there. At his first State of the Union Address, President Bush emphasized that "no nation is exempt from" the defense of liberty and justice. State of the Union Address, *at* http://www. whitehouse.gov/news/releases/2002/01/print/ 20020129-11.html (Jan. 29, 2002).[25] The President enunciated similar objectives for the invasion of Iraq last year: "As we press on to liberate every corner of Iraq, . . . [w]e'll help the Iraqi people to establish a just and representative government, which respects human rights and adheres to the rule of law." President George W. Bush, Remarks on Iraq from the Rose Garden (Apr. 15, 2003), *available at* http://www. whitehouse.gov/ news/releases/ 2003/04/ print/20030415-10.html.[26] Enforcing and practicing those policy objectives have secured the fair treatment of our own men and women captured on the field of battle and have paved the way for a more stable and humane world.

CONCLUSION

Amicus, Global Rights, respectfully urges the Court to affirm the decision below not only to hold the United States to its commitments under international law, but also to preserve

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[25] Punctuated by applause from both sides of the House chamber, the President further stated: "America will always stand firm for the non-negotiable demands of human dignity: the rule of law; limits on the power of the state; respect for women; private property; free speech; equal justice; and religious tolerance." State of the Union Address, *at* http://www.whitehouse.gov/news/releases/2002/01/print/20020129-11.html(Jan. 29, 2002) ("[W]e have a greater objective than eliminating threats and containing resentment. We seek a just and peaceful world beyond the war on terror.").

[26] "Our support for human rights policy in a positive way to create better human rights conditions around the world, our honest and forthright human rights reports: all of these things have continued. And they've continued alongside as part of our policy on terrorism." State Department Spokesman Richard Boucher, *in* U.S. Department of State Press Release, Transcript: State Department Noon Briefing, May 29, 2003, *available at* 2003 WL 2048222 (May 29, 2003).

the long-standing regime of human rights law that has protected scores of individuals from arbitrary caprice and Executive whim.

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